In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 76

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,

Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors Below.

Petitioners' Reply Brief

At the Clerk's suggestion we denominate this "Reply Brief," but it is presented so that the court will be advised of the opinion of the Arizona Supreme Court handed down on July 13, 1951, in the *Pressley* case, to which reference will be found in Petitioners' Brief in support of the petition for certiorari at pages 21-24. A copy of the opinion is appended hereto.

None of the parties to the *Pressley* case was satisfied with the opinion and all of them have filed petitions for rehearing; and it is not likely that final action will be taken by the Arizona Supreme Court until it convenes in middle September and gives the several petitions consideration.

Should the opinion stand as written, it definitely holds against petitioners in so far as their contention that the opinion of the Court of Appeals misinterpreted the Arizona decisions as to the elements of an election of remedies by an employee is concerned; and that part of Reason No. II found on Page 7 of Petitioners' Brief reading "and the court of appeals was in error in holding that no election resulted unless appellee had (1) Knowledge of the alternative remedies available and (2) Knowledge that the law precluded him from pursuing but one of such remedies" could not longer be maintained.

On the other hand, we submit that No. II is supported by the opinion in so far as petitioners contend (see pages 21 to 24 of their brief) that the failure of appellee to pursue the remedies afforded him by the Workmen's Compensation Act left the decision of the Commission against his attempted election binding on the courts. It will be noted that the Arizona Supreme Court concludes that the right of election is governed by Section 56-949 of the Arizona Code. That section is a part of the procedure for the determination of the injured employee's rights where third parties may be involved and it grants the commission a voice in any compromise negotiations that may arise between the injured employee and third parties.

The Arizona Supreme Court concludes its opinion with a consideration of the issue whether the Commission had correctly decided that an election had been made by Press-

ley to accept compensation in lieu of a claim against the third party, and held that the Commission erred in holding that, irrespective of Pressley's knowledge of his rights and intent to make a choice of one as against the other remedy, he had nevertheless made a binding election to accept compensation benefits. The award was set aside and the matter in effect remanded to the Commission to decide as an issue of fact whether in claiming compensation Pressley had acted with full knowledge of his alternative rights.

No other conclusion from this and other Arizona decisions cited in Petitioners' Brief appears reasonable except that an injured employee, having claimed or accepted compensation, must petition the Commission for leave to change his apparent election and apply to the Arizona Supreme Court for certiorari to the Commission if the latter reject his effort. Failing that, the Commission's denial has the force of a judgment which the courts may not annul. See particularly *S. H. Kress & Co. v. Superior Court,* 66 Ariz. 67, 182 P.(2) 931.

Nothing in the opinion adversely affects the other reasons advanced by petitioners for certiorari.

Petitioners will advise the court of further action by the Arizona Supreme Court in the *Pressley* case.

Respectfully submitted,

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(Appendix follows)